94

Supreme Court, U.S.
FILED

071493 MAY 27 2008

OFFICE OF THE CLERK

No. 07-

In The

Supreme Court of the United States

Salvador Zapien,

Petitioner

v.

The People of the State of California,

Respondent

On Petition For Writ Of Certiorari
To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

Roger T. Nuttall
Counsel of Record
Nuttall & Coleman
2445 Capitol St., Suite 150
Fresno, California 93721
(559) 233-2900

QUESTIONS PRESENTED

Whether the trial court's failure to instruct the jury regarding Petitioner's theory of the case, and more particularly, how his intoxication affected his relevant mental state, violates his rights, under the Sixth and Fourteenth Amendments, to adequate jury instructions?

Table Of Contents

Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	2
Statement of the Case	3
Reasons for Granting the Writ	3
Conclusion	6
Appendix	

Table Of Authorities

Constitutional Provisions

United States Constitution
Sixth Amendment 1-2
Fourteenth Amendment 1-2

Statutes

28 U.S.C. § 1257(a) 1

California Penal Code
§ 187(a) 2
§ 12022(b) 2

Cases

Beck v. Alabama
447 U.S. 625 (1980) 3-4

Conde v. Henry
198 F.3d 734 (9th Cir. 2000) 3

Market St. Ry. Co. v. Railroad Comm'n
324 U.S. 548 (1945) 1

People v. Ray
14 Cal.3d 20 (1975) 5

People v. Webber
228 Cal.App.3d 1146 (1991) 5

United States v. Escobar de Bright
742 F.2d 1196 (9th Cir. 1984) 4-5

United States v. Mason
902 F.2d 1434 (9th Cir. 1990) 3

United States v. Rohrer
708 F.2d 429 (9th Cir. 1983) 4

United States v. Sayetsitty
107 F.3d 1405 (9th Cir. 1997) 5

Other Authorities

Sup. Ct. R. 13.3. 1

Petitioner, Salvador Zapien, respectfully prays that a writ of certiorari issue to review the judgment imposed by the State of California.

This petition is timely filed pursuant to United States Supreme Court Rule 13.3. *See Market St. Ry. Co. v. Railroad Comm'n,* 324 U.S. 548 (1945).

OPINIONS BELOW

The unpublished opinion of the California Court of Appeal for the Fifth Appellate District, the highest state court to review the merits, appears at Appendix A to the petition and is reported at 2007 WL 4340994 (Cal.App. 5 Dist.).

JURISDICTION

The California Court of Appeal for the Fifth Appellate District entered its judgment on December 13, 2007. A copy of the Fifth District Court of Appeal's decision appears at Appendix A.

The California Supreme Court denied review in this case on February 27, 2008. A copy of the order denying review appears at Appendix B.

The instant Petition for Writ of Certiorari is filed within 90 days of that order.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1257(a) on the ground that his rights under the Sixth and Fourteenth Amendments to the United States Constitution were violated.

CONSTITUTIONAL AND STATUTORY PROVISIONS

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." *U.S. Const., amend. VI.*

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const., amend. XIV.*

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." Cal. Pen. Code, § 187.

"Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense." Cal. Pen. Code, § 12022(b).

STATEMENT OF THE CASE

Following a jury trial, Petitioner Salvador Zapien was found guilty of second degree murder (Cal. Pen. Code, § 187(a)), having been found not guilty of first degree murder. The jury also found true a special allegation of personal use of a knife. (Cal. Pen. Code, § 12022(b).)

On December 16, 2005, Petitioner was sentenced sixteen years to life in state prison.

The California Court of Appeal for the Fifth District affirmed the judgment in an unpublished opinion dated December 13, 2007.

A Petition for Review was filed in the California Supreme Court on January 22, 2008. The petition was denied February 27, 2008.

REASONS FOR GRANTING THE WRIT

This matter presents an important question of federal law because it conflicts with United States Supreme Court precedent.

"It is well established that a criminal defendant is entitled to adequate instruction on the defense theory of the case. *See United States v. Mason,* 902 F.2d 1434, 1438 (9th Cir. 1990)." *Conde v. Henry,* 198 F.3d 734, 739 (9th Cir. 2000). The defense theory here was voluntary intoxication as it related to Petitioner's mental state and malice. Because the trial court erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter, the jury was not adequately instructed regarding the defense theory of the case.

As noted in *Beck v. Alabama,* 447 U.S. 625 (1980), "it has long been 'beyond dispute that the

defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" *Id.* at 635.

Here, Petitioner consumed alcohol throughout the day on the date of the crime. He consumed a portion of a bottle of Bacardi rum, a small bottle of Rum Rico rum, and two or three beers thereafter. A forensic toxicologist testified that Petitioner's blood alcohol level at the time of the incident would have been approximately .10 or .12.

As Petitioner argued in the California courts, the fact that the jury was instructed that voluntary intoxication cannot be considered in determining whether the mental state required was formed pursuant to an implied malice theory of murder, the jury was not properly instructed regarding how it could properly consider Petitioner's intoxication in relation to the victim's death. The jury should have been instructed that it could return a verdict of guilty of second degree murder (under an implied malice theory) *or* involuntary manslaughter. Because the jury was not so instructed, it could not fully consider evidence of Petitioner's intoxication. A review of the instructions as a whole shows that the jury could have followed the court's instruction regarding the defense of voluntary intoxication and the lesser included offense of involuntary manslaughter. *See United States v. Rohrer,* 708 F.2d 429, 431 (9th Cir. 1983).

As the Ninth Circuit Court of Appeals stated in *United States v. Escobar de Bright,* 742 F.2d 1196, "[a] defendant is entitled to an instruction concerning his theory of the case if it is supported by law and has *some* foundation in the evidence. [Citations.] We

have emphasized that failure to give such a requested instruction is *reversible* error." *Escobar de Bright,* at 1198, emphasis in original. Here, as noted above, there was some foundation in the evidence for the giving of an instruction regarding voluntary intoxication.

> Further,
> a failure to instruct the jury on the defendant's theory of the case is reversible *per se.* The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error.

United States v. Escobar de Bright, 742 F.2d at 1201; *see also Duckett v. Godinez,* 67 F.3d 734, 743 (9th Cir. 1995). And, "[p]ermitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal." *Id.* at 1201-1202.

"[A] defendant has a constitutional right to have the jury consider defenses permitted under applicable law to negate an element of the offense." *United States v. Sayetsitty,* 107 F.3d 1405, 1414 (9th Cir. 1997). California law provides that if an accused is unable to harbor malice and the intent to kill due to voluntary intoxication, which does not render him unconscious, he cannot be guilty of an unlawful homicide greater than involuntary manslaughter, and the jury must be so instructed. *See People v. Ray,* 14 Cal.3d 20 (1975); People v. Webber, 228 Cal.App.3d 1146, 1162 (1991).

Because the federal courts have held that some evidence regarding the defense theory of the case requires that the jury be instructed with regard to that theory, where the jury was *not* so instructed, as here, with regard to Petitioner's intoxication and its affect upon his mental state, Petitioner's constitutional rights were violated.

CONCLUSION

Petitioner respectfully requests that this Court grant the writ of certiorari as the question presented herein is an important question of federal law.

DATED: May 27, 2008

Respectfully submitted,

NUTTALL & COLEMAN

ROGER T. NUTTALL
Counsel for Petitioner
Salvador Zapien

APPENDIX A - OPINION OF THE CALIFORNIA COURT OF APPEAL FOR THE FIFTH APPELLATE DISTRICT DATED DECEMBER 13, 2007

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent,
v.
SALVADOR ZAPIEN, Defendant and Appellant.

F049722
(Super. Ct. No. 080865)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Darryl Ferguson, Judge.

Nuttall & Coleman and Roger T. Nuttall for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, J. Robert Jibson and Janine R. Busch, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Salvador Zapien was convicted of second degree murder for the stabbing death of his ex-girlfriend, Angela Campos Ruiz (the victim). On appeal, defendant contends: (1) his second degree

murder conviction should be reversed or reduced to voluntary manslaughter because it is not supported by sufficient evidence and the evidence shows, as a matter of law, he killed the victim in a heat of passion on sufficient provocation; and (2) the trial court erred by failing to give, sua sponte, instructions on involuntary manslaughter on a theory of voluntary intoxication, or his trial counsel rendered ineffective assistance for failing to request such instructions. We will affirm the judgment.

FACTS

The fatal stabbing in this case occurred on September 22, 2001. About two months earlier, the victim moved out of the residence she shared with defendant. The victim apparently did not reveal to defendant the address or phone number of her new residence. However, defendant continued to call the victim on the cell phone she used for work. A few days before the killing, the victim asked her work supervisor if her cell phone number could be changed because defendant was calling her. Although the victim's request for a new number was approved, it was not changed before she was killed.

On the evening of September 22, 2001, the victim attended a wedding reception for one of her male coworkers. She arrived at the reception hall at approximately 5:00 p.m., around the same time as her friend and coworker, Virginia Contreras, and Contreras's date, Juan Moya. The three sat at a table near one of the exits of the reception hall.

About an hour later, defendant showed up. The victim, who had not mentioned defendant was going to be there, looked at Contreras with an expression of surprise. Defendant came up to their table, presented the victim with a plastic red rose

and asked if he could join them. The victim replied, "'Well, I guess, if you want.'"

Defendant did not appear to be intoxicated when he arrived at the wedding, but in Moya's words, was "talking real well." During the course of the evening, the victim, Moya, and Contreras each had one or two beers, and defendant may have had two or three beers. Defendant never appeared intoxicated to Moya or Contreras. They also observed no arguing between defendant and the victim, who danced together once or twice.

During the evening, defendant conversed with Moya. Defendant asked him about the possibility of Moya hiring him as a truck driver. Moya told defendant they could talk once defendant obtained a truck-driving license. Defendant also asked Moya questions about who the victim was seeing. Moya responded that it was not his (Moya's) business to check up on who the victim was seeing.

Around 9:00 p.m., the victim, Moya, and Contreras decided to leave the wedding reception. They walked together from the reception hall to their vehicles. Contreras testified:

> "[CONTRERAS]: We were leaving the building. We went and said good by [sic] to the bride and groom, and he stood up - -
>
> "THE COURT: Who is 'he'?
>
> "[CONTRERAS]: Salvador. He walked with us, as walking Angela out. And we were maybe a couple steps in front of Angela and Salvador. I looked back and it was normal. And Juan and I continued to the car which was just about in front of it. There is only - we were parked here - we were parked facing south, and she was parked facing north, and

only one car in between us, so you can clearly see her, Angela, and Salvador.

"We got into the car immediately when they were approaching Angela's car. She unlocked it and opened the door. And when she was going to get in, we were already - had pulled behind her, so we saw her get in the car, and Salvador closed the door. And then we moved up so that she can pull behind Juan and I, and she was right behind us. And then he continued - Salvador continued to walk towards the hall through the main entrance."

Contreras confirmed she did not see any kind of argument between defendant and the victim.

After they left the parking lot, Moya and Contreras initially observed the victim's car behind them but shortly lost sight of her. Contreras called the victim's cell phone several times and left messages when the victim failed to answer. After Moya briefly stopped at a stop sign to wait for the victim's car, Moya and Contreras continued on their journey home. On cross-examination, Moya confirmed they were not concerned enough to turn around to see where the victim was, explaining, "We didn't think that anything could have happened, that's why . . .." Contreras also testified: "I didn't worry because there was no arguments. There was no other indication of him [defendant] being upset. He wasn't drinking. He wasn't drunk. He didn't smoke. He was actually - he was calm. So there was no - nothing that indicated to me that [the victim] was in danger . . .."

Around 9:19 p.m., a sheriff's deputy discovered the victim's car abandoned in a vineyard about a mile or so outside the town where the wedding

reception was held. It appeared the car had traveled out of its lane of the two-lane road, crossed the dirt shoulder, and come to rest in a couple rows of grape vines. The interior of the car was covered with blood and a black-handled knife was seen stuck into the panel of the driver's door. About five to ten minutes later, the deputy was notified about someone being brought into the hospital. He testified the hospital was about a 15-minute drive from the crime scene.

Analysis of evidence gathered from the crime scene and damage to the victim's car and defendant's pickup truck revealed that the front end of defendant's truck had collided with the left side of the victim's car while traveling at a high rate of speed. The evidence also indicated that the driver's window of the victim's car had been shattered while it was in the up position. None of her other windows was broken.

A hospital security guard testified that he observed defendant driving at a high speed up to the emergency driveway entrance to the hospital. About 15 minutes later, the security guard was paged to the waiting room. He noticed a lot of blood on defendant. The security guard asked defendant to move his truck and to go to the waiting room to register his wife. Defendant complied with the request. The security guard testified that, when defendant returned from moving his truck, he was crying and "got on his knees and begged to see his wife." The security guard asked defendant what had happened. Defendant said, "it was a long story, that they were separated and he - he saw her and got jealous and they both did it." Shortly thereafter, around 9:30 p.m., a sheriff's deputy arrived at the hospital and the security guard left.

A pathologist testified that the victim had 29 stab wounds to her upper body. Five of the wounds were deeply penetrating, causing injury to internal organs, including her heart. The stab wound to the victim's heart completely severed the left ventricle and ended in the heart chamber. The pathologist opined that after this wound was inflicted, the victim would have lost consciousness within a matter of minutes. The victim also had a number of defensive wounds on her hands. The pathologist opined that the cause of death was multiple stab wounds to the chest.

The sheriff's deputy who arrived at the hospital around 9:30 p.m. met defendant in the lobby and had him go outside and sit on the curb. Defendant told the deputy he used to live in Fresno with his wife. He said they had been at a party and had left to get some beer and to be by themselves. While inside his wife's car, they got into an argument. Defendant said he picked a knife up off the floorboard and stabbed her "a lot."

Another deputy arrived to transport defendant to the local substation of the sheriff's department. A photograph of defendant's right hand, taken after his arrest, showed his fingers and knuckles were swollen. He also had a slight abrasion on his arm. During the ride to the substation, defendant was crying and kept asking if the victim was okay.

Defendant remained at the substation until around 1:00 a.m., when Frank Arnold, a sheriff's detective, arrived to transport defendant to the violent crimes unit. Detective Arnold noticed defendant appeared to have trouble walking and thus thought he might be intoxicated. The detective gave defendant a bag and told him not to throw up in

his car.

A blood sample was taken from defendant around 2:00 a.m. No measurable amount of alcohol was found in the sample. A foresnic toxicclogist testified that, had a person stopped drinking at 9:00 p.m., and had a blood alcohol of .00 percent at 2:00 a.m., the maximum number of drinks that person could have had before 9:00 p.m. would have been four. If the person's blood alcohol level had peaked at 9:00 p.m., the person's maximum blood alcohol level would have been .1 or .12 percent at that time. By 1:00 a.m., the person's blood alcohol would be around .02 percent. At that level, the toxicologist would not expect the person to exhibit signs of extreme intoxication, such as having difficulty walking.

In an interview starting sometime between 1:30 and 2:00 a.m., defendant spoke with Detective Arnold and another detective about the stabbing. Defendant's heat of passion theory at trial, and now on appeal, was based on the statements he made to the detectives during this interview. We therefore set forth defendant's statement in some detail below.

Defendant told the detectives that he called the victim on her cell phone around 4:30 p.m., and that she invited him to come to the wedding. Defendant also described consuming a number of alcoholic beverages before and during the wedding reception. According to defendant, around 3:00 p.m., he drank three or four inches from a bottle of rum. Before he reached the wedding reception, he stopped at a convenience store, where he purchased the plastic rose for the victim, plus a small bottle of rum. While he was driving, he consumed the rum and threw the bottle out of the window. During the

wedding reception, he had four or five beers.

Defendant claimed that when the victim and her companions got up to leave the wedding reception around 9:00 p.m., defendant asked the victim to remain with him. When she declined, defendant asked why. The victim responded with a number of insults, including that defendant was "not a man," a "piece of shit," and a Spanish slur defendant translated for the detectives as meaning a "bull with no balls." Defendant told the detectives he became upset ands said to the victim, "so all this time, I'm being a bull . . . fuck you." But when the victim responded by starting her car, defendant stood in front of her car and said, "[P]lease Angela." The victim replied, "get out of here, go to hell" and then drove away.

Defendant admitted that he followed the victim in his pickup truck and said that, at one point, she stopped her car and said, "stop following me, God damn asshole. I told you don't, I don't want to be with you anymore." When he continued to follow her, the victim tried to speed up. The defendant sped up, trying to pass her. Defendant claimed he hit the victim with his truck as he was trying to pass her and that she then went "under the vines." Defendant got out of his truck to go talk to the victim and help her out of her car. When he reached her car, the victim said, "stop it, get the fuck out of here you mother fucker." Defendant tried to open the driver's door but the victim locked it.

According to defendant, he and the victim started arguing and hitting each other through the open window of her car. "She yell at me, you son of a bitch. And I say you God damn bitch all these things I was using, using me. All these, all those two years

you was using me and yeah and we start, we start, she starts throwing for my head and I don't know how, I don't know how the knife come in." Defendant confirmed he had a folding knife in his pocket, which he took out and opened.

Defendant admitted to detectives, "I was mad about that time already." When asked what he did with the knife, defendant said, "I stuck it three or four times." When asked where, defendant replied, "I think by the lips something like that because . . . it's because we, she, we struggle with the hand, the hand and my knife." Defendant confirmed the victim was trying to stop him by grabbing his hand and arm.

Defendant said he then opened the door and tried to pull the victim out but something, probably her seat belt, was holding her. Defendant said the victim threw a punch at his stomach and he went to hit her with his hand, "but I forget I have a knife." Defendant said he "just throw like that one or two or three times" in the victim's body. He thought he hit her in the stomach but was uncertain.

Defendant got the car door open and stood in front of it. He could not remember which hand the knife was in. The victim said to defendant "you son of a bitch." Defendant replied, "yeah I'm a son of a bitch now, before what and I start hitting more, hitting more, hitting more." Defendant claimed he did not know where the knife was at this time or see that the victim was bleeding. Defendant stated: "That's when I, I get out of the car and put her over me and put her in the, take her to the hospital because after that she says see what we doing, I say yes, that's what you wanted."

Defendant described "driving like hell to the

hospital" and repeatedly saying "don't die." Defendant claimed that on the way to the hospital, the victim was breathing and her eyes were open. The victim said to defendant, "Oh I love you or I know."

When asked how many times he stabbed the victim, defendant said, "I don't know. Probably three or four or I don't know." Defendant then said he could not remember, though he remembered hitting her a lot. When asked how he was feeling at the time, defendant said, "I was mad, I don't want to kill her. I don't want to, just only try to because she was making me so mad she know, she try to provoking me to get mad or something like that and she provoking me, she know how to do it and she know to tell me all those bad things."

Later during the interview, defendant explained he did not know how many times he stabbed the victim because "I was not in my conscious, I was so pissed off." Defendant also asserted, "I was drunk, she invite me to the wedding and I was drinking and I was drunk." When asked why he followed her instead of just going home, defendant responded: "Because I was pissed off for her" and "I want to argue more with her about why she doing something like that. Inviting me to the, to the wedding to start fighting."

DISCUSSION

I. Sufficiency of evidence of second degree murder

Defendant contends his conviction of second degree murder must either be reversed or reduced to manslaughter because it is not supported by sufficient evidence.

The applicable standard of appellate review is

well established. When assessing the sufficiency of the evidence, a reviewing court considers the entire record in the light most favorable to the judgment below to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Hawkins* (1995) 10 Cal.4th 920, 955.) The reviewing court presumes in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence, including reasonable inferences based on the evidence. (*People v. Tran* (1996) 47 Cal.App.4th 759, 771-772.) We do not reweigh evidence or determine if other inferences more favorable to the defendant could have been drawn from it. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Penal Code section 187[1] states in relevant part: "(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

> Section 188 states in relevant part:
> "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."
> Section 189 states in relevant part:
> "[A]ny . . . kind of willful, deliberate, and premeditated killing . . . is murder of the first degree. All other kinds of murder are of the second degree."

---

[1]Further statutory references are to the Penal Code unless otherwise specified.

The elements of second degree murder are (1) an unlawful killing; (2) accomplished with malice aforethought, whether express or implied. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 735.) Malice is expressed when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. More specifically, malice is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life. (*People v. Robertson* (2004) 34 Cal.4th 156, 164.) In such circumstances, it is not necessary to establish that the defendant intended his or her act would result in the death of a human being. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 368.) Nevertheless, an unlawful killing may constitute manslaughter rather than murder - even in the presence of intent to kill or conscious disregard for life - if the defendant killed in a sudden quarrel or heat of passion or in an unreasonable but good faith belief in the need to act in self-defense. (*People v. Robertson, supra,* 34 Cal.4th at pp. 164-165.)

In the instant case, defendant contends his state of mind was compromised by the fact he was acting under the heat of passion upon adequate provocation by the victim without a sufficient cooling period. The test of whether provocation or heat of passion can negate malice so as to mitigate murder to voluntary manslaughter is objective. No defendant may set up his or her own standard of

conduct and justify or excuse himself or herself because in fact his or her passions were aroused unless the facts and circumstances were sufficient to arouse the passions of the ordinary reasonable person. On the other hand, the test of whether provocation or heat of passion can negate deliberation and premeditation so as to reduce first degree murder to second degree murder is subjective. If this were not so, the provocation would be a defense to murder and would be sufficient to reduce the crime to manslaughter. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 678.)

Here, defendant first asserts the second degree murder conviction is not supported by sufficient evidence and then goes on to posit an alternative theory - based on his statements to detectives several hours after the stabbing - that he did not possess the requisite malice for second degree murder because he killed [the victim[2]] in a heat of passion after she adequately provoked him with what he describes as a "tirade of degrading verbal remarks."

Initially, we note that defendant's argument and briefing on appeal focuses on the evidence favorable to his position and ignores evidence to the contrary. For almost a quarter of a century, this court has held that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact. If a defendant contends some particular issue of fact is not sustained, they are required to set forth in their brief all the material evidence on the point and not merely their own evidence. Unless this is done, the error is

---

[2]The opinion mistakenly reads "because he killed defendant . . ."

deemed to be waived. *(People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.) A defendant bears the burden of demonstrating there is no substantial evidence to support the challenged finding or findings and a recitation of only defense evidence is not the demonstration contemplated under this rule. (*Id.* at p. 283.)

Assuming for purposes of argument the briefing is sufficient, we must nevertheless reject defendant's challenge to the sufficiency of the evidence to support the malice element of second degree murder. From the evidence presented, the jury reasonably could have concluded that after the victim left the wedding reception, defendant followed her in his pickup truck, rammed the side of her car, causing her to drive off the road into a vineyard, forcibly broke through her car window, and repeatedly stabbed her in the vulnerable upper body region as she struggled to fight him off with her hands. The jury reasonably could have concluded that defendant acted with malice when he stabbed the victim 29 times either because his actions manifested a deliberate intention unlawfully to take away her life or because the circumstances showed an abandoned and malignant heart. The evidence presented at trial was more than sufficient to support defendant's conviction of second degree murder for killing his former girlfriend.

Defendant nevertheless contends "the facts . . . reveal a classic manslaughter case." He contends the adequate provocation may be legally established by the victim's verbal abuse or incitement of the defendant to anger. Defendant's contention is essentially predicated on the notion that we may reweigh the evidence in his favor on appeal. The

power to judge the credibility of witnesses, to resolve conflicts in testimony, to weigh evidence, and to draw factual inferences is vested in the trier of fact. (*In re Arturo D.* (2002) 27 Cal.4th 60, 77.) Factual contradictions and conflicts are for the jury to consider and the appellate court must resolve them in support of the verdict. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1213; *People v. McPhillips* (1957) 149 Cal.App.2d 687, 688.)

Defendant's contention implies there was no conflict in the evidence regarding his account of a heated encounter with the victim prior to the stabbing. However, the jury reasonably could have discredited defendant's version of events based on inconsistencies in his statements and conflicting witness observations. For example, within the first half hour of the stabbing, defendant *admitted* he stabbed the victim "a lot" and made no mention of her insulting him. However, several hours later, defendant claimed to detectives he could not clearly remember the stabbing and did not know how many times he stabbed her while at the same time recounted her alleged insults to him in considerable detail.

Other circumstances raising doubts about the veracity of defendant's version of events include his suggestion to detectives during the interview that the victim encouragingly invited him to meet her at the wedding reception. The prosecution presented conflicting evidence indicating that the victim was in the process of severing all ties with defendant. Just days before the murder, she requested her work cell phone number be changed, which appears to have been defendant's remaining means of calling her directly. There was also evidence the victim

appeared surprised when defendant appeared at the wedding. And her response to his request to sit at their table - "'Well, I guess, if you want'" - was equivocal and lukewarm. Additionally, witness descriptions of defendant walking with the victim to her car, briefly standing next to her car, and then closing the car door are not easily reconciled with defendant' description of a more drawn-out verbal exchange, wherein, at one point, he allegedly stood in front of the victim's car, imploring, "Please, Angela." *'"[I]t is left to the jurors* to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense under a heat of passion.'" (*People v. Berry* (1976) 18 Cal.3d 509, 515.) As there was conflicting evidence on the heat of passion issue, we are required to defer to the jury's resolution of the issue against defendant.

However, even if we could reweigh the evidence, and even assuming the veracity of the defendant's account of events, defendant has presented no legal authority of persuasive argument for his suggestion that the victim's purported conduct - i.e., making offensive remarks impugning his masculinity - was sufficiently provocative, *as a matter of law*, to provoke an ordinarily reasonable person under the circumstances to a legal attack. As the People point out, the cases on which defendant relies to support his claim bear no resemblance to the instant case. (*People v. Berry, supra,* 18 Cal.3d at pp. 513-515 [over a two-week period, the murder victim alternated between verbally taunting her husband about her extramarital affair and sexually teasing him]; *People v. Borchers* (1958) 50 Cal.2d 321, 323-

326, 329 [the murder victim engaged in "long continued provocatory conduct[,]" including an extramarital affair, threats to commit suicide, an attempted suicide, and verbal taunting of the defendant including taunting him to kill her]; *People v. Kelley* (1929) 208 Cal. 387, 393 [the murder victim's "fatal injuries [were inflicted] during a sexual debauch in which the decedent was a willing participant" and "there [was] nothing in the record from which it [could] with reason be argued that they were inflicted with that intent or that malice aforethought which is a necessary ingredient of the crime of murder"].)

In view of the absence of compelling legal support for his argument, and the other reasons discussed above, we reject defendant's claim the evidence only showed he committed heat of passion voluntary manslaughter and find sufficient evidence of second degree murder.

II. Instructions on involuntary manslaughter

Defendant's other contention on appeal is that there was sufficient evidence to support instructions on the lesser included offense of involuntary manslaughter. Defendant specifically argues that, because he presented substantial evidence he was intoxicated at the time of the stabbing, the jury should have been instructed that, if it determined as a result of his voluntary intoxication he was unable to form the mental state necessary for first degree murder, second degree murder, or voluntary manslaughter, it could still convict him of involuntary manslaughter. Thus, defendant argues either the trial court erred by failing to give instructions on involuntary manslaughter sua

sponte, or his trial counsel rendered ineffective assistance for failing to request such instructions.

A. Failure to instruct sua sponte on involuntary manslaughter

Involuntary manslaughter is a lesser included offense of murder. (*People v. Parras* (2005) 128 Cal.App.4th 1603, 1612-1613.) A trial court must instruct on lesser included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present. Conversely, even on request, a trial court has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.) In this context, substantial evidence is evidence sufficient to deserve consideration by the jury; in other words, evidence that a reasonable jury could find persuasive. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) The testimony of a single witness, including that of the defendant, can constitute substantial evidence requiring the court to instruct sua sponte. (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

In noncapital cases, error in failing to instruct sua sponte, or to instruct fully, on all lesser included offenses and theories which are supported by the evidence are reviewed for prejudice exclusively under the *Watson* test.[3] Thus, a conviction of the charged offense may be reversed in consequence of this form of error only if, after an examination of the entire cause, including the evidence, it appears reasonably probable the defendant would have obtained a more

---

[3] *People v. Watson* (1956) 46 Cal.2d 818, 836.

favorable outcome had the error not occurred. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

Assuming, without deciding, there was substantial evidence to support instructions on involuntary manslaughter, any error was harmless. Evidence that the defendant was unable to form the malice required for second degree murder as a result of voluntary intoxication was weak, at best. Despite his account to detectives of drinking a considerable quantity of alcohol up to and during the time of the wedding reception, defendant's suggestion that he was in a drunken rage when he killed the victim conflicting with the toxicological evidence that before 9:00 p.m., he could have consumed, at most, four alcoholic beverages, and that his blood alcohol level at that time, would have been around .1 or .12 percent. The toxicologist testified on cross-examination that at this level of intoxication a person *might* not be thinking clearly. He also testified that, even if the person was not showing outward signs of intoxication, it would not be safe for that person to drive or fly a plane. This is a far cry, however, from defendant's suggestion that his intoxication essentially rendered him unaware, or unconscious, of his actions during the stabbing.

Moreover, defendant's supposed lapses of awareness occurred at incredibly convenient times. Although he claimed to detectives to remember little about the actual stabbing, as noted above, he did remember all her humiliating remarks, which served as the basis for voluntary manslaughter instructions. In addition, defendant told detectives that he was unaware of how seriously injured the victim was or that her blood covered his clothes and the interior of his truck. Nonetheless, he had the wherewithal to

drive the victim to the emergency room and recounted, again in detail, how he begged her not to die and how she said "I know" or "I love you" to him. Finally, witnesses who observed defendant near the time of the stabbing testified he did not appear intoxicated but was speaking well.

On this record, if the jury had been instructed on the offense of involuntary manslaughter on a theory of voluntary intoxication, it is highly unlikely that the jury would have found defendant guilty of this crime rather than of murder. Accordingly, we find the failure to give such instructions, if error at all, was harmless.

B. Failure to request instructions on involuntary manslaughter

In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was deficient because his or her representation fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must also show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown only when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have bene different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*In re Thomas* (2006) 37 Cal.4th 1249, 1256.)

Once again, evidence defendant's mental state was affected by intoxication was extremely weak. For the reasons discussed above, we see no reasonable probability the jury, even if fully instructed, would have found that defendant was so intoxicated that he could not form the mental state required for murder and instead convict him of

involuntary manslaughter. Defense counsel's failure to request instructions on involuntary manslaughter in no way undermines our confidence in the verdict. Accordingly, the asserted ineffective assistance of counsel was not prejudicial.

DISPOSITION

The judgment is affirmed.

/s/
HILL, J.

WE CONCUR:

/s/
LEVY, Acting P.J.

/s/
KANE, J.

APPENDIX B - ORDER DENYING REVIEW
IN THE CALIFORNIA SUPREME COURT
DATED FEBRUARY 27, 2008

Court of Appeal, Fifth Appellate District
No. F049722

S160198

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,
v.
SALVADOR ZAPIEN, Defendant and Appellant.

The petition for review is denied.

George, C.J., and Corrigan, J., were absent and did not participate.

BAXTER
Acting Chief Justice

CERTIFICATE OF COMPLIANCE

No. 08-_____

Salvador Zapien

Petitioner,

v.

The People of the State of California

Respondent.

As required by the Supreme Court Rule 33.1(h), I certify that the petition for writ of certiorari contains 1,302 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 21, 2008.

ROGER T. NUTTALL
Counsel for Petitioner
SALVADOR ZAPIEN

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF FRESNO) SS.

I hereby certify that I am a member of the U.S. Supreme Court bar and that I have on this date served copies of the PETITION FOR WRIT OF CERTIORARI on all parties required to be served by depositing them in the United States Mail, first-class postage prepaid, at Fresno, California, addressed as follows:

Janine R. Busch, Dep. Atty. General
Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Leisa V. Biggers
Fifth District Court of Appeal
2424 Ventura Street
Fresno, CA 93721

Phil Cline
Tulare County District Attorney
221 Mooney Blvd., Room 224
Visalia, CA 937291

Salvador Zapien, F11972 Bldg. 1-125L
California State Prison - Solano
P.O. Box 4000
Vacaville, CA 95696-4000

Clerk of the Court
Tulare County Superior Court
221 S. Mooney Blvd.
Visalia, CA 93291

Dated May 27, 2008, in Fresno, California.

ROGER T. NUTTALL